IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18/1/2005

C O R A M

The Honourable Mr. Justice V.KANAGARAJ

CRL. R.C.No.1929 of 2004

Mohammed Ansari @ Ansari
s/o Moidheen Sheik,
Rohini Plastic House,
Gnaniar Nagar,
Karumbukadai, Coimbatore-8. ... Petitioners
(Accused No. 2)

Vs.

The State,
Rep. by Additional Dy. Superintendent of Police,
SIT, CBCID,
B-1 Police Station,Crime No.151/98,
Coimbatore. ... Respondents
(Complainant)

This petition is filed under Sections 397 and 401 of Crl. P.C., as stated therein.

For Petitioners: Mr.R.Sankarasubbu
For Respondent: Mr.A.N.Thambidurai
(Govt. Advocate Crl. Side)

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O R D E R

This Criminal Revision Case is filed praying to set aside the order passed in Crl.M.P.No.369 of 2004 dated 18.11.2004 in S.C.No.2 of 2000 on the file of the Subordinate Judge for trial of Bomb Blast Cases, Coimbatore and direct the trial judge to allow the petition filed under Section 311 of the Code.

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2. In the affidavit filed in support of the revision case, it is stated that the trial court in the earlier occasion without prior notice examined the witnesses accepting the plea of the prosecution and the witnesses tendered for cross examination as and when the petition under Section 311 of the Code is filed; that the principle accepted in that case of the nature 2000 witnesses were examined out of whom only 64 were recalled and the cross examination would be over next week; that the trial court appreciated the the role of Sessions defence oral Mr.P.T.Thirumalai Rajan reading the materials formed an opinion to recall 63 witnesses, who are the material witnesses and unless they are recalled, the defence would be prejudiced; that the trial court ought to have seen due to non-payment of fees to junior counsel, the senior had withdrawn his appearance, which resulted in miscarriage of justice; that the case is voluminous in nature clubbing 40 FIRs involving the life of 166 accused; that the trial court has not appreciated the gravity of offence and the non-examination of the material witnesses would cause great prejudice to the petitioner; that the trial court mis-conceited Section 311 of the Code; that unless the witnesses were examined just decision of the case will not be rendered; that the learned Judge erred in accepting the plea of the prosecution that the case will be delayed is not acceptable, as the accused are in prison for the last 7 years and therefore the petitioner prays to set aside the order in Crl.M.P.No.369 of 2004 dated 18.11.2004 in S.C.No.2 of 2000 by the Court of Sessions Judge for trial of Bomb Blast Cases, Coimbatore and direct the trial judge to allow the petition filed under Section 311 of the Code.

3. The learned counsel appearing on behalf of the petitioner/2nd accused would cite the following decisions respectively passed in (i) HOFFMAN ANDREAS Vs. INSPECTOR OF CUSTOMS, AMRITSAR (2001 Supreme Court Cases {Cri.} 1488); (ii) SHAILENDRA KUMAR Vs. STATE OF BIHAR & OTHERS (2002 Supreme Court Cases {Cri.} 230); (iii) RAJENDRA PRASAD Vs. NARCOTIC CELL (1999 Supreme Court cases 1062)and (5) in MOHANLAL SHAMJISONI Vs. UNION OF INDIA & ANOTHER (1991 Supreme Court Cases {Cri.} 595.

4. In the first judgment cited above reported in (supra) 2001 S.C.C. {Cri.} 1488), it has been held:

> "Three witnesses were examined for the prosecution and they were cross-examined by the counsel engaged by the appellant (Mr. Kailash Sammuel). After the stage of cross-examination of those three witnesses was over, unfortunately the said Mr Kailash Sammuel passed away. The

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appellant then engaged Mr S.S.Chahal, Advocate for defending him in the trial. The new advocate filed a petition on 9.4.1997 invoking the power of the Court under section 311 of the Code of Criminal Procedure (hereinafter referred to as "the Code") for recalling the three witnesses for the purpose of further cross-examination. The ground urged by the new counsel for recalling those witnesses was the following:

'His case was conducted by Mr Kailash Sammuel, Advocate who had died during the pendency of the trial and that it has now transpired that Kailash Sammuel, Advocate was not keeping well and was under some mental pressure and he could not concentrate during the proceedings and as such, he failed to cross-examine the prosecution witnesses on material points.'"

5. In the second judgment cited above reported in (supra) (2002 S.C.C. {Cri.} 230) wherein it is held:

"Learned counsel for the accused-respondent however submitted that in this case there is no question of referring to Section 311 of Cr.P.C. in view of the earlier order dated 1.2.2000 passed by the High Court Setting aside the order dated 20.9.1995 passed by the Additional Sessions Judge recalling the order dated 3.9.1994 by which the prosecution evidence was declared to have been closed. The submission is without any substance. Section 311 empowers the court to summon material witnesses though not summoned as witnesses and to examine or recall and re-examine if their evidence appears to it to be essential to the just decision of the case. It reads thus:

"311. Power summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned

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as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case'
(Emphasis supplied)

Bare reading of the a foresaid section reveals that it is of a very wide amplitude and if there is any negligence, laches or mistakes by not examining material witnesses, the Court's function to render just decision by examining such witnesses at any stage is not, in any way, impaired. This Court in Rajendra Prasad v. Narcotic Cell (1999 SCC (Cri) 1062)

After all function of the Criminal Court is administration of Criminal justice and not to count errors committed by the parties or to find court and declare who among the parties performed better."

6. In the third judgment reported in (supra)(1999 S.C.C. {Cri.} 1062) wherein in paragraphs 9 and 12 it has been held:

"The very same decision Mohanlal Shamji Soni v. Union of India (1991 Supp. (1) SCC 271 1991 SC 1346) which cautioned against filling up lacuna has also laid down the ratio thus: (AIR Head note) 'It is therefore clear that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must sense appear to be the only safe guides and that only the requirements of justices command the examination of any person which would depend on the facts and circumstances of each case.'...

"We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of re-summoning any witness if once that power was exercises, not can the power be whittled down merely on the ground that the prosecution discovered laches only when the

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defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses therefore be spurned down or frowned at."

7. And in the final judgment reported in (supra)(1991 S.C.C. {Cri.} 595), in paragraph 10 it has been held:

"It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under Illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a court must discharge its statutory functions - whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a court not only to do justice but also ensure that justice is being done. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new

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Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though ;not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

On such arguments, the learned counsel for the petitioner would pray for the relief extracted supra.

8. On the contrary, the learned counsel appearing on behalf of the respondent/State would submit that the crucial point for consideration is whether a case is made out for recalling the witnesses as it has been brought forth in the petition filed by the petitioners before the trial court under Section 311 of Cr.P.C. It is a very serious case connected to bomb-blast which had serious and disastrous consequences in the society and there are 167 accused and from among the witnesses cited so far 1299 witnesses have been examined and the only witness yet to be examined is the Chief Prosecuting Officer. At this juncture, the petitioners have come forward to recall 63 witnesses. Excepting 10 witnesses, others have been re-examined and cross-examined. The learned trial Judge in full consideration of the facts and circumstances of the case and the law on the subject has arrived at a fair conclusion and there is no room for any interference to be caused by this court and on such arguments the learned counsel would pray for dismissing the above Criminal Revision Case.

9. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the arguments of the learned counsel for both, what this Court is able to assess is that it is an admitted case that the total number of accused are 167 and the witnesses examined are 1,299. According to the prosecution, the only witness yet to be examined is the Chief Prosecuting Officer and at this stage, the tenth accused filed an application under Section 311 of Cr.P.C., seeking to recall 63 witnesses for the purpose of cross-examination before the examination of the Investigating Officers.

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10. The reasons assigned on the part of the petitioners for recalling those 63 witnesses are that the counsel either engaged or appointed by the State to defend the petitioners since for some reason or other, did not attend to the trial on various occasions nor did they conduct the cross-examinations fully, as a result of which, 10 witnesses were not cross-examined and the other 53 witnesses were also not sufficiently cross-examined and hence the petition filed under Section 311 of Cr.P.C.

11. The Court of Sessions Judge for trial of Bomb Blast Cases, Coimbatore, having assessed the facts and circumstances has put forth on the part of the petitioners therein and having offered the details pertaining to the examination and cross-examination of the witnesses in detail and having its own discussions and offering its own reasons, though would preliminarily arrive at to dismiss the petition in toto, still despite all the negative factors prevalent, again reconsidering its own view would arrive at the conclusion to recall witnesses numbering 8 (i.e.) P.Ws.444, 734, 809, 847, 957, 1044, 1225 and 1287, thus allowing the application to the restricted purpose of recalling those eight witnesses mentioned supra and rejecting the plea of the petitioners to recall the other witnesses named therein, further ordering that no recall petition shall be filed in future connected with the cross-examination of these witnesses and thus deciding the said petition filed before the Special Court for Bomb Blasts Cases, Coimbatore in Criminal Miscellaneous Petition No. 369 of 2004 in Sessions Case No. 2 of 2000 and it is this order which has been challenged by the second accused as the sole petitioner on grounds that the trial Court in earlier occasions, without prior notice examined the witnesses accepting the plea of the petitioner that the witnesses tendered for cross-examination as and when the petition under Section 311 of Cr.P.C., is filed; that in a case of this nature, out of 2000 witnesses, only 64 witnesses were recalled and cross-examination would be over by one week; that the trial Court appreciated the role of the Sessions defence lawyer P.T.Thirumalai Rajan, who on reading the materials honestly formed an opinion to recall 63 witnesses, who are the material witnesses and unless they are recalled and cross-examined, the defence would be prejudiced; that the trial Court ought to have seen that due to non-payment of fees to junior counsel, the Senior counsel withdrew his appearance, which resulted in miscarriage of justice.

12. A careful perusal of the orders passed by the trial Court in a case of such nature, entertaining an application filed by the petitioners therein under Section 311

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of Cr.P.C., to recall the witnesses numbering 63, though strictly speaking not a single witness could be recalled, since according to the trial Court, a fair and reasonable opportunity has been afforded for the petitioners to exhaust their remedies in the examination or cross-examination of the witnesses and in spite of such opportunities, if they did not make use of the same within the permissible limits of law, neither the Court nor the prosecution could be blamed for the same and therefore, the trial Court had every reason to arrive at the preliminary conclusion that the petitioners were not entitled to claim it as of right for recalling the 63 witnesses.

13. Still, on a paramount consideration of the fact that nearly 9 witnesses have not been cross-examined sufficiently by the defence, having assigned reasons, the Court has permitted them to be recalled benevolently. Though many number of judgments have been cited by the counsel appearing on behalf of the petitioner, it could be seen that in the above proceedings initiated as Criminal Revision case before this Court all the other petitioners who figured in the petition filed before the trial Court excepting the second accused, who is the petitioner herein have not filed any revision and it is only the second accused who has come forward to testify the validity of the order passed by the trial Court and even this petitioner has no locus standi to represent the other petitioners also nor could it be said that all those 63 witnesses sought to be recalled in the petition filed by 10 accused before the trial Court are relevant for consideration in the above Criminal Revision Case, filed by the second accused alone, since it cannot be said that all the 63 witnesses said to be examined are relevant to the case of the second accused alone and therefore, from this angle of approach, basically the entire order passed by the lower Court even regarding 9 others cannot be testified by the petitioner nor could it be said that those grounds offered are relevant to the context of the case and they are general in nature. The reason offered that their advocates failed cannot hold water since it is a privilege between the party and the Advocate with which Courts have nothing to do nor could appreciate such plea taken on the part of the petitioner.

14. Though from the judgments cited, the Honourable Apex Court has observed consenting to recall certain witnesses if in the context of the facts of those cases dealt with by the Courts if their evidence appears to be essential to just decision but for the arguments advanced here, in the circumstances of this case, it cannot be so recalled. However emphasis is laid that any Court at any stage of trial can recall and re-examine the witnesses who have already been examined,

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since the section has very wide amplitude and if there occurs any negligence, latches or inconsistency by not examining the material witnesses, the Courts are expected to render just decisions by examining such witnesses at any stage is not, in any way, impaired. As it has been held in the second judgment cited above, these principles have been adopted in the other judgment also and therefore, it has become necessary on the part of this Court to consider in the context of the case in any way such opportunities have been afforded by the trial Court.

15. A careful perusal of the trial Court order would definitely reveal that the trial Court has considered the case of the petitioners therein including that all the revision petitioners herein and only thereafter has arrived at the conclusion to permit all the 9 witnesses to be recalled in liberal application of the norms of law enshrined under Section 311 of Cr.P.C., and this Court does not feel it necessary to cause its interference in any manner into the well considered and merited order passed by the Court below and hence the following order.

In result,

(i). the above Criminal Revision Case does not merit acceptance but becomes only liable to be dismissed and the same is dismissed accordingly.

(ii). the order dated 18/11/2004 made in S.C.No. 2 of 2000 by the Court of Sessions Judge, for trial of Bomb Blast Cases, Coimbatore, is hereby confirmed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To
1. The Court of Sessions Judge,
for trial of Bomb Blast Cases, Coimbatore,

2. The Additional Deputy Superintendent of Police,
SIT CBCID
B1 Police Station, Coimbatore.

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3. The Superintendent,
   Central Prison, Coimbatore.

4. The District Collector,
   Coimbatore.

5. The District General of Police,
   Mylapore, Chennai.

6. The Public Prosector,
   High Court, Madras.

1 cc to Mr. R. Sankarasubbu, Advocate, SR. 2075
1 cc to Public Prosecutor, High court, Madras. SR. 1790

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